Nos. 84-495 and 84-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD THORNBURGH, *et al.*,
Appellants

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *et al.*

EUGENE F. DIAMOND, *et al.*,
Appellants

v.

ALLAN G. CHARLES, *et al.*

On Appeal from the United States Courts of Appeals for the Third and Seventh Circuits

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BRIEF AMICI CURIAE ON BEHALF OF THE NATIONAL ORGANIZATION FOR WOMEN; HUMAN RIGHTS FOR WOMEN, INC.; EQUAL RIGHTS ADVOCATES; THE LEAGUE OF WOMEN VOTERS FOR THE UNITED STATES; NORTHWEST WOMEN'S LAW CENTER; NATIONAL WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; AND WOMEN'S LEGAL DEFENSE FUND

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INTEREST OF AMICI

This brief *amici curiae* is being submitted on behalf of the National Organization for Women (NOW), Human Rights for Women, Inc., Equal Rights Advocates, The

League of Women Voters for the United States, Northwest Women's Law Center, National Women's Law Center, NOW Legal Defense and Education Fund, and Women's Legal Defense Fund.[1] *Amici* are women's rights and civil rights organizations[2] whose constituencies and interests are seriously affected by the decisions in these cases. At issue is whether a woman's fundamental right to privacy in deciding whether or not to terminate a pregnancy will continue to be protected against undue state interference. *Amici* file this brief because of the extraordinary importance of this right to women, girls and their families.

INTRODUCTORY STATEMENT AND SUMMARY

As recently as 1983, in a series of cases involving state statutes and local ordinances restricting access to abortions, this Court reaffirmed that the fundamental constitutional right of privacy encompasses, and protects against undue governmental interference, a woman's right to make the highly personal choice whether or not to terminate her pregnancy. *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 (1983). The instant cases again present for this Court's review state legislation that attempts to restrict the exercise by women of this constitutionally protected right.

In *Thornburgh v. American College of Obstetricians and Gynecologists*, No. 84-495, this Court is being asked to review the constitutionality of various sections of the Pennsylvania Abortion Control Act, 19 Pa. Cons. Stat. Ann. §§ 3201-3220 (Purdon 1983) ("Pennsylvania Act"),[3]

[1] Counsel for all parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk.

[2] Statements describing each organization appear in the Appendix to this brief.

[3] The Pennsylvania Abortion Control Act, at issue in *Thornburgh*, No. 84-495, was signed into law on June 11, 1982, prior to this Court's ruling in *Akron*. *See* Jurisdictional Statement at 8a-14a, *Thornburgh*, No. 84-495.

which require, *inter alia*, that the method used in performing abortions involving a viable fetus, absent "significantly greater" risk to the mother, be that most likely to result in live birth Section 3210(b)).[4] The Third Circuit held these provisions unconstitutional. Jurisdictional Statement at 43a-50a, 68a-71a, *Thornburgh*, No. 84-495 [hereinafter cited as *Thornburgh*, J.S.].

The Illinois Abortion Law of 1975, as amended (the "Illinois law"), at issue in *Diamond v. Charles*, No. 84-1379, makes it a felony for a physician performing an abortion involving a fetus that the physician knows has "a possibility . . . of sustained survival" to fail to exercise a certain standard of care toward the fetus and requires that doctors who prescribe certain types of birth control substances or devices inform their patients that they are being given "abortifacients."[5] The Seventh Circuit held both of these provisions unconstitutional. Jurisdictional Statement, Appendix at 32-43, *Diamond*, No. 84-1379 [hereinafter cited as *Diamond*, J.S. App.].

[4] Also presented for review are requirements that: two physicians be present at all abortions performed after viability; certain specified information be provided to all abortion patients; physicians and abortion providers submit reports on all abortions and facilities; minors seeking abortions obtain the consent of at least one parent or guardian; and, certain printed material discussing available social services and scientific information about the fetus be made available by the state. All of these provisions were struck down by the Third Circuit. Although *Amici* believe that all of these provisions are invalid and urge affirmance of the Third Circuit's decision, they will not address them further herein.

The Third Circuit also struck down the section of the statute requiring more expensive insurance premiums for health and disability policies that include abortion coverage. Appellants did not appeal this ruling.

[5] The statute also makes it a felony for a physician who performs an abortion involving a fetus "known to be viable" to fail to use the specified standard of care toward the fetus. The Seventh Circuit found this provision to be unconstitutionally vague. *Amici* urge affirmance of that finding, but will not address this provision further.

The right to privacy in the decision whether to terminate a pregnancy—the most profound and difficult of procreative and personal decisions—was first recognized in *Roe v. Wade*, 410 U.S. 113 (1973), and strongly reaffirmed two years ago in *Akron*. None of the parties to these appeals have taken issue with this Court's holdings in *Roe* and *Akron*. An *amicus* brief filed by the Acting Solicitor General, however, urges this Court to reconsider and reverse *Roe v. Wade*. Amici submit that this attack is constitutionally flawed and blatantly hostile to the health and lives of girls [6] and women. The first section of this brief examines the arguments made by the Solicitor General urging reversal of *Roe v. Wade* and sets forth why those arguments are insupportable. *Roe v. Wade* must again be affirmed unequivocably.

In the second part of the brief, *Amici* consider the three statutory provisions identified above: the method of abortion (Section 3210(b)) provision of the Pennsylvania Act; and the standard of care toward a potentially viable fetus (Section 6(4)) and "abortifacient" (Section 11(d)) provisions of the Illinois law. As was recognized by the respective Courts of Appeals in their rulings on these cases, these three provisions impermissibly restrict the fundamental right of a woman to choose to have an abortion. *Amici* will argue below that these rulings should be upheld. These three provisions, as measured according to strict judicial scrutiny,[7] are unconstitutional.[8]

[6] Throughout this brief, any reference to women is intended to include girls as well, because the right to choose to have an abortion is of fundamental significance to any female of childbearing age. *See Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976). In 1981, 28% of all abortions—approximately 364,210—were performed on girls 19 years old or younger. Center for Disease Control, 33 *Morbidity & Mortality Weekly Report*, No. 26, p. 373 (July 6, 1984). In addition, in 1982, girls between the ages of 15 and 19 had 513,758 live births. National Center for Health Statistics, 33 *Advance Report of Final Natality Statistics*, No. 6, Supplement, p. 13, Table 2 (September 28, 1984).

ARGUMENT

I. A WOMAN'S FUNDAMENTAL RIGHT TO DECIDE WHETHER OR NOT TO TERMINATE HER PREGNANCY—A RIGHT ESSENTIAL TO HER ABILITY TO CONTROL HER OWN LIFE—MUST BE PROTECTED FROM IMPERMISSIBLE GOVERNMENTAL INTERFERENCE.

A. The Supreme Court's Decision In *Roe v. Wade* Correctly Followed Well-Established Precedent And Should Be Affirmed.

Based on a long and compelling line of constitutional authority through which the Court endeavored to give meaning and substance to the concept of personal liberty guaranteed by the Constitution, this Court concluded in 1973 that the right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe v. Wade*, 410 U.S. at 152-56. Although the Court rejected arguments that the woman's right to choose an abortion is absolute, it deemed the right fundamental. *Id.* at 155.

Roe v. Wade follows this Court's prior rulings about the right to privacy. The right to privacy in family, marital and reproductive decisions has been, for many

[7] The strict scrutiny standard is called into play if two conditions exist. First, the obstacle to the exercise of the fundamental right must have been created by the government. *Maher v. Roe*, 432 U.S. 464 (1977). Second, the restriction must impinge upon the exercise of the fundamental right. *Danforth*, 428 U.S. 52 (1976). Since both conditions are present, the obstacles created by the Pennsylvania and Illinois statutes can stand only if justified by a compelling state interest narrowly drawn. *Roe v. Wade*, 410 U.S. 113 (1973).

[8] In both of these cases appellants raise jurisdictional issues, including whether or not the respective Courts of Appeals exceeded their proper scope of review. These issues, although important, are outside the specific interests of *Amici* and are not addressed herein.

decades, consistently protected by the Supreme Court. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Loving v. Virginia*, 388 U.S. 1 (1967); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The first of these privacy cases, *Meyer*, held that the 14th Amendment to the U.S. Constitution protects a zone of family and marital rights that are recognized as "essential to the orderly pursuit of happiness." The Court stated that

> [w]hile this Court has not attempted to define with exactness the liberty thus guaranteed, . . . [w]ithout doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience . . . .

Id. at 399. Thus, fifty years before *Roe v. Wade*, this Court recognized that the Constitution protected the marital and family privacy of individuals from governmental intrusion.

The area of marital privacy was also protected by the Court in *Griswold*. In that case, the state of Connecticut made the use of contraceptives a criminal offense. The Court found that the statute was an unconstitutional invasion of privacy. Justice Douglas' majority opinion justified the constitutional right of privacy as a logical and necessary corollary of the specific guarantees of the Bill of Rights. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. (Citation omitted.) Various guarantees created zones of privacy." 381 U.S. at 484. The prohibition against contraception affected "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." *Id.* at 485. Citing *Boyd v. U.S.*, 116 U.S. 616, 630 (1886) and *Mapp v. Ohio*, 367 U.S. 643, 656 (1961), this Court found that the Fourth and Fifth Amendments "create a zone of privacy," a right to be left alone by government

in marital and family relationships. *Id.* at 484-5. Finally, in concluding his opinion, Justice Douglas described the marital right of privacy as one that predates the constitutional framework itself:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school systems. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486.

In *Eisenstadt v. Baird*, this Court clarified the holding in *Griswold* by concluding that the right to privacy in making reproductive choices applied to single persons as well as to married couples. The Court held that dissimilar treatment of married and unmarried persons in limiting access to contraceptives violated the equal protection clause of the 14th Amendment. The Court concluded that there was no rational explanation for the different treatment of married and unmarried persons. The Court stated that, whereas in *Griswold* the issue was marital privacy, such privacy rights belong not to the couple as an entity, but to each member of the couple:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.*

Eisenstadt, 405 U.S. at 453 (emphasis added). Thus, the Court established that the fundamental right to make

choices regarding one's reproductive life free of unwarranted governmental intrusion belonged to each *individual*.

The government claims that this Court's subsequent holding in *Roe v. Wade*, that the right to privacy encompasses a woman's right to decide whether to have an abortion, was a radical departure from historical constitutional precedent. This claim is patently false. While *Roe v. Wade* dealt with medical procedures that were unavailabe throughout much of the nation's history, and while the decision was this Court's first pronouncement on abortion, the decision nonetheless followed an established constitutional framework.[9] In asking for reversal of *Roe v. Wade*, while not questioning the right of privacy as a fundamental constitutional right, the government asks this Court for an illogical, nonsensical constitutional holding. As Justice Stewart noted in his concurring opinion in *Roe*,

> Certainly the interests of a woman in giving of her physical and emotional self during pregnancy and the interest that will be affected throughout her life by the birth and raising of a child are of a far greater degree of significance and personal intimacy than the right to send a child to private school protected in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), or the right to teach a foreign language protected in *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Id. at 170 (quoting *Abele v. Markle*, 351 F. Supp. 224, 227 (D.Conn. 1972)). The government's argument, if successful, would lead to the absurd conclusion that whether or not a child is taught German or French is a more intimate and private matter than whether or not one has a child at all.

The government's attack on *Roe*, for the most part, ignores the analytic framework of the privacy doctrine set out in *Griswold*, *Eisenstadt* and *Roe*. It does not consider what the right of privacy means or how it has developed through this Court's pronouncements over the past sixty-odd years. Thus, the government urges this Court

[9] *See* Heymann and Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. Rev. 765 (1973).

to abolish the privacy doctrine as it applies to abortions, but does *not* seek reversal of *Griswold* or *Eisenstadt*. Its brief in no way explains how the right to privacy can protect birth control usage and yet not apply to the right of women to determine whether or not they will carry a pregnancy to term. The Solicitor General claims, in a footnote, that the holding in *Griswold* was based on a concern that enforcing the statute would have required "governmental prying into the privacy of the home." Brief for the United States as Amicus Curiae at 28 n.6, *Thornburgh* and *Diamond* [hereinafter cited as S.G. Brief]. Outlawing abortion, the government claims, can be done without such "repulsive searches." *Id.* This statement betrays total contempt for the women who must make decisions about abortion. It totally disregards the gross invasion of privacy and repulsive seizure of the person implicated by governmental restrictions on abortion.[10]

The Solicitor General argues that the answer to whether *Roe* was correctly decided is to be found in the history of the due process clause of the 14th Amendment and the intentions of its framers. He relies on the premise that since the states were free to regulate, and prohibit, abortion in the 1860's, so should they be free to do so today. That premise totally disregards the differences between the legal and social status of women today, as compared to what it was in the middle of the Nineteenth Century.[11]

[10] The administration's interpretation of *Griswold* is highly inaccurate. *Griswold* protects intangible rights: the right of privacy, the right of marital intimacy. *Griswold* is by no means limited by this Court to protecting real estate from search. *See* Tribe, *The Supreme Court, 1973 Term—Forward: Toward A Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 17 & n.83.

[11] In the 1860's, women had few, if any, legal rights. *See generally*, L. Kanowitz, *Women and the Law—The Unfinished Revolution* (1969); L. Kanowitz, *Sex Roles in Law and Society* (1973). Given this historical fact, it is difficult to see how the intentions or contemplations of the men who enacted the 14th Amendment could in any way be relevant to its application to the legal rights of women today.

Moreover, with respect to the personhood of a fertilized ovum, history consistently demonstrates that no such personhood ever

The attack against *Roe* challenges the wisdom and appropriateness of the Court's conclusion that a woman's right to determine whether or not to terminate a pregnancy is fundamental and encompassed within the right to privacy.[12] The Solicitor General refers to an "instability in the law" [13] he says was caused by *Roe*, but ignores

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existed or was intended. In spite of broad prohibitions against abortion, exceptions always existed under most state laws on the grounds of the pregnant woman's health, fetal abnormality, rape or incest, etc. *See* Luker, *Abortion & the Politics of Motherhood* 32-33, 80-81, n.18 (1984). If the fertilized ovum is held to be a person by this Court, any such exceptions for therapeutic abortions would violate the 14th Amendment. *Roe*, 410 U.S. at 157, n.54. The embryo would then have a right to life *superseding* the life of the pregnant woman. Indeed, abortion would not be permitted to save the life of the pregnant woman. Thus, this Court wisely rejected the theory of embryonic personhood because it was entirely inconsistent with virtually all American abortion legislation at the time the 14th Amendment was adopted, as well as during prior decades and thereafter. *See* Luker, *supra*, at 11-39.

[12] It is important to note that this Court held in *Roe* that the woman's right to privacy in considering abortion is not absolute. *Id.* at 154. It must be balanced against important competing state regulatory interests. *See also*, Justice Burger's concurring opinion: "Plainly, the court today rejects any claim that the Constitution requires abortion on demand." *Id.* at 208. Sen. Humphrey's alarmist conclusion that *Roe* results in "abortion-on-demand" and prevents state prohibition of abortion "at any time during pregnancy," thereby permitting abortion "right up to birth" (Brief Amicus Curiae of U.S. Sen. Gordon J. Humphrey, et al. at 5-7, *Thornburgh* and *Diamond*), is therefore entirely false. This Court carefully considered the important fundamental right to privacy in making reproductive choices, but it also weighed the competing interests served by state regulation of abortion.

[13] S.G. Brief at 2 and 24. The Solicitor General also complains that courts have had difficulty in applying *Roe v. Wade*. *Id.* at 20. The basis for this assertion, however, is left unstated. *Amici* suggest that the statement merely reflects the administration's disagreement with the particular application made in *Roe* of the familiar constitutional doctrine underlying the right to privacy. Thus, it counters what is called the "extreme and unseemly hostility" of the courts below toward abortion regulation (S.G. Brief at 16) with arguments that ignore the fact that those courts, and this

the tyranny that existed before *Roe* when women could be, and were, denied the most basic measure of personal, bodily integrity and self-determination. Summary reversal of *Roe* would lead to extreme uncertainty on the part of medical professionals as to the legality of many standard medical procedures. It would result in a legal and health care crisis of nationwide proportions and in the injury or death of thousands of women and teenage girls.

The government argues, in effect, that the right of the state recognized in the funding cases to make policy judgments favoring childbirth over abortion [14] gives the state the right to intrude between a woman and her physician in determinations regarding appropriate medical treatment. Reference to the funding cases alone, however, ignores the important distinction, emphasized by the Court in both the decisions referenced by the government, between direct state interference with a protectd activity—the right to decide whether to terminate a pregnancy—and state encouragement of an alternative activity. *Maher v. Roe*, 432 U.S. 464, 473-75 (1977). The cases at bar involve direct governmental interference with the constitutionally protected right to decide whether to terminate a pregnancy. Thus, were the government's position accepted, the right of the state to favor childbirth would become the bludgeon with which a woman's right to personal liberty is destroyed. As Justice Douglas noted in his concurring opinion in *Doe v. Bolton*:

> Where fundamental personal rights and liberties are involved the corrective legislation must be "narrowly drawn to prevent the supposed evil" (citations omitted) and not be dealt with in an "unlimited and indiscriminate" manner. (Citations omitted.) Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveler of constitutional rights and liberties.

410 U.S. 179, 216 (1973).

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one, are dealing with legislation that is designed to deprive women of the fundamental constitutional right to privacy.

[14] *See*, e.g., *Maher v. Roe*, 432 U.S. 464 (1977).

To abandon, as the government urges, the course taken in *Roe v. Wade* would render for women the constitutional guarantee of personal liberty an empty promise incapable of attainment. Speaking for the rights of women, those individuals who uniquely understand all of the interests at stake in the decision whether or not to terminate a pregnancy, *Amici* urge this Court to hold steadfast in its defense of the fundamental right recognized in *Roe* and affirmed in *Akron*.

B. The Right To Choose Abortion Is, In Essence, The Right To Control One's Life, Without Which Most Other Rights Become Meaningless.

If there is to be any re-examination of *Roe*, *Amici* urge that it be one which again acknowledges and affirms that the right of each individual woman to control her reproductive functions is nothing less than the right to control her own life. Indeed, "the right of a woman to determine her own reproductive life is a basic human right" [15] and it must be accorded constitutional protection commensurate therewith. If women do not have the right to terminate unwanted pregnancies, their rights to life, liberty, and the pursuit of happiness are virtually meaningless. They cannot participate as full and active members of society.

In *Roe*, Justice Blackmun touched upon the importance to women of the right to decide whether to terminate a pregnancy by referencing how pregnancy and maternity can affect a woman: higher mortality rates, physical and psychological harm, abandonment of educational plans, and loss of income and career opportunities.[16] *Roe*, 410 U.S. at 153. These factors, though they establish a compelling predicate for the right identified therein, present but a mere shadow of the fundamental personal and social interests at stake in the determination of who should have the right to control a woman's decisions re-

[15] Presidential Task Force of the Citizens' Advisory Council on the Status of Women, *Task Force Report on Family Law and Policy* 31 (1968).

[16] *See also, Doe v. Bolton*, 410 U.S. 179, 214-15 (1973) (Douglas, J., concurring).

garding her reproductive functions. Stated most concisely, denied the right to choose whether and when to bear children women will forever be denied full membership and participation in our society.[17]

To begin to appreciate the extent to which women's role in society has been narrowly limited by their reproductive functions one need look no further than the numerous and oft-cited pronouncements of this Court regarding the role of women in society, among the most notorious of which is as follows:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. And as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
>
> . . . Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. . . . Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained,

[17] *See* N. Erickson, *Women and the Supreme Court: Anatomy is Destiny*, 41 Brooklyn L. Rev. 209, 214 (1974) ("[s]tereotyped sex-role assumptions are based ultimately on the core concept that woman's role is narrowly limited by her reproductive function.") and C. Jones, *Abortion and the Consideration of Fundamental, Irreconcilable Interests*, 33 Syracuse L. Rev. 565, 570-71 (1982). *See also*, Tribe, *supra* note 10, at 40, where in discussing whether a woman's husband should have the right to decide whether she may have an abortion, Prof. Tribe notes:

> To give men the unreviewable power to sentence women to childbearing and childraising against their will is to delegate a sweeping and unaccountable authority over the lives of others. Any such allocation of roles would operate to the serious detriment of women as a class, given the multitude of ways in which unwanted pregnancy and unwanted children burden the participation of women as equals in society. Even a woman who is not pregnant would inevitably be affected by her knowledge of the power relations thereby created.

> even when like legislation is not necessary for men, and could not be sustained.

Muller v. Oregon, 208 U.S. 412, 421-23 (1908).[18] The resultant protections not only limited the hours women could work, but also the types of jobs they could obtain, the professions they could pursue and all nature of legal rights otherwise afforded men.[19] In this context, one can more clearly appreciate that the ability of women to control their own reproductive processes is of tremendous importance to the role women will play in society.

The immediate personal consequences of a return to the time when government was free to interfere with, and preclude, a woman's decision to terminate her pregnancy must also weigh heavily in the Court's consideration of this issue. Prior to *Roe* when abortion was illegal in most states unless necessary to save the life of the mother, it is estimated that between 200,000 and 1,200,000 illegal abortions were performed annually.[20] As one District Court

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[18] The statute before the Court in *Muller* limited the number of hours women could be employed for pay outside the home. Of course,

> [n]o law has ever attempted to prevent any woman, whether actually pregnant or one of the unmarried and sixty-year-old potential mothers of the race, from performing any amount of heavy work without pay. She may scrub floors . . . go into the field and replace a horse or hired man . . . with a full job of housework care for several young children all their waking hours . . . .

Note, *Constitutional Law—Regulation of Conditions of Employment of Women: A Critique of Miller v. Oregon*, 13 B.U.L. Rev. 276, 289 (1933).

[19] *See* generally, B. Babcock, A. Freedman, E.H. Norton and S. Ross, *Sex Discrimination and the Law, Causes and Remedies* (1975), pp. 4-53, 51-66; L. Kanowitz, *supra* note 11, at 31-38.

[20] W. Cates, *Legal Abortion: The Public Health Record*, 215 Science 1586 (March 26, 1982). By comparison, in 1969, there were only approximately 22,000 reported legal abortions in the United States. By 1972, the number of legal abortions had increased to almost 600,000, and yet "the Center for Disease Control estimates that 130,000 women were unable to obtain legal abortions and resorted to illegal or self-induced procedures during that year."

observed in 1972, it was "common knowledge that if women cannot obtain (lawful) abortions . . . many (will) subject themselves to the notorious 'back-street abortion' . . . fraught with the myriad possibilities of mutilization, infections, sterility and death." *YWCA v. Kugler*, 342 F. Supp. 1048, 1074 (D.N.J. 1972). Estimates of annual deaths caused by illegal abortions were difficult to obtain due to the clandestine nature of such abortions. However, such estimates were as high as 5,000 to 10,000 deaths per year.[21] Other adverse health consequences, such as severe infection,[22] permanent sterility,[23] or other serious complications were, of course, even more frequent than death.

The tragic consequences certain to follow from denial to women of the right to legal, safe abortions have most recently been illustrated by events following this Court's decisions denying poor women the right to Medicaid funding for abortions.[24] Studies document the intense determination women have exhibited to control their own reproductive destinies, and the hardship, distress and human

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Alan Guttmacher Institute, *Abortion in the U.S.: Two Centuries of Experience*, 2 Issues in Brief, No. 4 at 3 (1982). Since 89% of the legal abortions performed in 1972 were performed in 17 states that had repealed or reformed their anti-abortion statutes, it is estimated that at least a third of the women who obtained legal abortions that year were required to travel outside their home state to do so, incurring significantly increased health risks and expense. *Id.* at 3-4.

[21] Bates and Zawadzki, *Criminal Abortion* (1964), p. 3-4.

[22] *See, e.g.*, Decker and Hall, *Treatment of Abortion Infected with Clostridium Welchii*, 95 Am. J. Obst. & Gynec. 394 (1966); Mortiz and Thompson, *Septic Abortion*, 95 Am. J. Obst. & Gynec. 46 (1966); Reid, *Assessment and Management of the Seriously Ill Patient Following Abortion*, 199 J. AMA 805 (1967); Shenoi, Smits and Davidson, *Massive Removal of Small Bowel During Criminal Abortion*, 2 Brit. Med. J. 929 (1966); Studdiford and Douglas, *Placental Bacteremia: A Significant Finding in Septic Abortion Accompanied by Vascular Collapse*, 71 Am. J. Obst. & Gynec. 842 (1956).

[23] Rommer, *Sterility: Its Cause and Its Treatments* 59 (1952).

[24] *See Beal v. Doe*, 432 U.S. 438 (1977) and *Maher v. Roe*, 432 U.S. 464 (1977).

suffering endured by those for whom this right was substantially diminished by the funding decisions.[25] For the 37-year-old AFDC recipient who had 12 previous pregnancies and died of complications after attemping to abort herself with a glass thermometer and the pregnant teenage mother who shot herself in the stomach because she did not have the $600 necessary to pay for an abortion,[26] the absence of safe, legal, available abortion was a matter of life and death.

For all women, irrespective of financial or personal circumstances, the choice between abortion and childbirth may literally be a life or death decision. Between 1972 and 1978, a woman was approximately seven times more likely to die from childbirth than from legal abortion.[27] For abortions up to the 15th week of pregnancy, childbirth is 10 times more likely to result in death than is abortion.[28]

In no other situation has it ever been suggested that the government has the right and authority to demand, or any interest so compelling as to justify forcing, one person to risk their life for another, let alone for the mere potentiality that another person might one day come into existence. The government's position gives precedence to zygotes and embryos over living human beings. It values the existing lives of women less than the potential life within an embryo. It would subordinate the lives of women today and in the future to a single biological function, very much as they were subordinated 100 years ago. This Court recognized as much two years ago in *Akron*.

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[25] *See* Trussel, Menken, Lindheim and Vaughan, *The Impact of Restricting Medicaid Financing for Abortion*, 12 Family Planning Perspectives, No. 3 at 120 (May/June 1980). *See also, Women's Health Services, Inc. v. Maher*, 482 F. Supp. 725, 731 & n.9 (D. Conn.), vacated, 636 F.2d 23 (2d Cir. 1980) where the court cited evidence that indigent women could raise the money necessary for abortion only by denying themselves and their families the basic necessities of life.

[26] Trussel, *supra* note 25, at 129.

[27] Le Bolt, Grimes and Cates, *Mortality From Abortion and Childbirth*, 248 J. AMA 188 and 192 (1982).

[28] *Id.* at 196.

At that time, the Court specifically rejected the invitation to give preeminance to the state's interest in preserving potential human life or to measure abortion regulations under a rational basis test because to do either would be "wholly incompatible with existence of the fundamental right recognized in *Roe v. Wade*." *Akron*, 472 U.S. at 420 n.1.

The reality confronting the Court today is the same reality with which it dealt twelve years ago in deciding *Roe v. Wade*. The reality is whether a woman, about whose life and existence there can be no speculation, is entitled to protection from undue governmental interference in the most personal decision affecting her life and well being. As has been demonstrated since *Roe* was decided, it is possible to accommodate the state's interests in maternal health and potential life within an analytical framework that recognizes, affirms and protects the very real and personal right to privacy and liberty that is a cornerstone of our constitutional system. That right must, if it is to mean anything at all, encompass a woman's right to decide whether or not to carry a pregnancy to term. *Amici* urge the Court again to recognize and acknowledge, with at least the same concern afforded the state's interests, the fundamental interest of the woman involved in the abortion decision in exercising effective control over her reproductive functions and, in so many ways, over her very life itself. We urge affirmance of *Roe v. Wade*.

II. THE CHALLENGED PROVISIONS IMPERMISSIBLY BURDEN—AND IN SOME INSTANCES MAY EFFECTIVELY PREVENT—THE EXERCISE OF THE FUNDAMENTAL RIGHT OF A WOMAN TO DECIDE WHETHER OR NOT TO TERMINATE HER PREGNANCY.

This Court repeatedly has held that a statutory scheme which infringes upon a woman's fundamental right to decide to terminate her pregnancy by abortion can survive constitutional scrutiny only if justified by a compelling state interest that is narrowly drawn to express the legiti-

mate state interests at stake.[29] *Roe v. Wade*, 410 U.S. at 155. The Court in *Roe* accepted the assertion by the State of Texas that there are legitimate state interests during the pregnancy in the health of the woman and in protection of potential fetal life.[30] Finding these interests to be separate and distinct, and conflicting with the woman's right to decide to terminate a pregancy, the Court divided pregancy into trimesters, defining the legitimate state interest, and, therefore, the parameters of state interference, at each juncture.

During the first trimester of pregnancy, neither the state's interest in the woman's health nor in potential fetal life can justify *any* state interference with the woman's right to decide. In the second trimester, state intrusion is permissible only if it promotes the state's legitimate interest in ensuring the woman's health. In the third trimester, the state's interest in the potential life of the fetus is sufficient to justify significant intrusion, even a total proscription of abortion, *unless* an abortion is necessary to preserve the life or health of the woman. *Roe*, 410 U.S. at 163-64. Thus, protecting the woman's health is the paramount state interest in the second and third trimesters of pregnancy. When measured against this interest, the challenged restrictions must fail, for they are nothing more than a thinly veiled attempt to limit the availability of abortions, in essence to accomplish through the back door what the Court forbade in *Roe*.

Consistent with the principles set forth in *Roe*, this Court and many others below have invalidated government imposed restrictions that ran afoul of the familiar and

[29] *See supra*, note 7.

[30] This Court declined to define the point at which life begins. "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Roe v. Wade*, 410 U.S. at 159. The Court rejected the attempt of Texas to define "life" as beginning at conception and thus to justify state interference throughout the pregnancy.

oft-applied strict scrutiny constitutional standard.[31] Most recently, the Court in *Akron* reviewed restrictive abortion regulations that imposed requirements ranging from hospitalization for post-first trimester abortions to disposal of the remains of an abortion in a "humane and sanitary manner." In its review of these enactments, the Court addressed itself to the validity of the basic *Roe* holding, and found compelling reasons to reaffirm that decision. *Akron*, 426 U.S. at 420 n.1.

The Court again accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.[32] Accordingly, the Court in *Akron* concluded that the government's interest in protecting maternal health did not justify a hospitalization requirement for all second trimester abortions, where that requirement "imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure." 462 U.S. at 438. The Court also found that the City's regulations governing "informed consent," which required doctors to provide each patient

[31] *See, e.g., Doe v. Bolton*, 410 U.S. 179 (1973) (requirement that all abortions be approved in advance by a hospital abortion committee); *Danforth*, 428 U.S. 52 (spousal and parental consent requirements); *Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), aff'd mem. sub. nom. *Gerstein v. Coe*, 428 U.S. 901 (1976) (spousal and parental consent requirements); *Leigh v. Olson*, 497 F. Supp. 1340 (D.N.D. 1980) (informed consent, 48-hour waiting period and parental notification requirements); *Women's Medical Center of Providence, Inc. v. Cannon*, 463 F. Supp. 531 (D.R.I. 1978) (requirement that physician's have certain hospital privileges); *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D.La 1980) (post-first trimester hospitalization, presumptive viability, parental consent, informed consent and 24-hour waiting period requirements).

[32] The Solicitor General argues that *Akron* signaled a departure from the principles which guided the Court's previous abortion regulation decisions. He relies for this proposition, however, on statements from *Maher* and *Harris v. McRae*, 488 U.S. 497 (1980). Both of these cases involved government restrictions on medicaid funding for abortions, not direct state interference with the right to choose abortion. *See* discussion at pp. 10-11, *supra*.

information "designed not to inform the woman's consent but rather to persuade her to withhold it altogether," were an unconstitutional attempt "to extend the state's interest in ensuring 'informed consent' beyond permissible limits." *Id.* at 444.

The limitations on abortions imposed by the challenged restrictions in the two cases now before the Court attempt to circumscribe a woman's behavior and significantly impair the exercise of her fundamental right to decide whether to bear a child. These restrictions cannot be dismissed as "not burdensome or chilling." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 66 (1976), *citing* 392 F. Supp. at 1374. Nor can they be characterized as merely "state encouragement of . . . childbirth," *Maher v. Roe*, 432 U.S. at 475, or described as placing "no obstacles in the pregnant woman's path to an abortion." 432 U.S. at 474. The statutory schemes enacted by Pennsylvania and Illinois forcefully interject government into a constitutionally protected decision-making process, riding roughshod over individuals' most private decisions. They are aimed at coercing a woman not to terminate her pregnancy by placing obstacles directly in her path.

By intruding directly into the decision-making process at critical points, the method of abortion requirements of the two statutes and the "abortifacient" provision of the Illinois law are intended to coerce and influence a woman to continue her pregnancy. The government seeks to do this irrespective of the reasons for the woman's own choices, and, most indefensibly, without regard to the fact that the pregnancy may be life endangering or health-threatening. These provisions all but preclude the physician's exercise of medical judgment and thus encumber the exercise of the woman's constitutionally protected right "by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice. . . ." *Whalen v. Roe*, 429 U.S. 589, 604 n.33 (1977) (quoted in *Akron*, 462 U.S. at 445).

A. Pennsylvania's Restriction On Abortion Methods Absent "Significantly Greater" Risk To The Mother Is Void For Vagueness.

Under Section 3210(b) of the Pennsylvania Act, *supra*, it is a felony for a physician performing an abortion on a fetus she has determined to be viable to fail to use the abortion technique "which would provide the best opportunity for the unborn child to be aborted alive unless, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique. . . ." The Third Circuit, relying on this Court's ruling in *Colautti v. Franklin*, 439 U.S. 379 (1979), held the section unconstitutional because it fails to require that maternal health be the physician's paramount consideration in the determination of which abortion procedure to employ. *Thornburgh*, J.S. 68a-71a.

In *Colautti*, the Court had before it certain portions of an earlier version of the Pennsylvania Act before the Court in *Thornburgh*. Section 5a of the predecessor statute required "the physician to employ the abortion technique offering the greatest possibility of fetal survival, provided some other technique would not be necessary in order to preserve the life or health of the mother." *Id.* at 397. This section was found void for vagueness because it was "uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." *Colautti*, 439 U.S. at 400.

Both the Third Circuit and the district court recognized that the state could not constitutionally require the mother to be at any increased risk in order to save a fetus. *Thornburgh*, J.S. at 69a. They differed, however, in their respective interpretations of the term "significantly greater." The very fact of this difference supports the conclusion that the statute fails to give persons of ordinary intelligence notice of what conduct is forbidden by

the statute and is, therefore, void for vagueness. *See Colautti*, 439 U.S. at 390.

The constitutional standard in this situation, that the mother cannot be required to bear *any* increased risk for the sake of the fetus, is clear. The state easily could have adopted that standard, but chose instead to obfuscate. Use of the phrase "significantly greater," in light of the legislature's stated intent to mandate equality of rights between the mother and the fetus,[33] could only have been meant to require just exactly the trade-off prohibited in *Colautti*. The State's assertion that the provision comes into play "only if there is no meaningful difference in the risks" ignores the plain language of the statute and, in particular, the modification of "greater" by "significantly." This difference is illustrated by considering whether a reference to "any greater risk" means the same thing as a reference to "significantly greater risk." Clearly it does not. The decision of the Third Circuit striking this provision should be affirmed.

B. Section 6(4) Of The Illinois Law, Which Restricts Abortions Prior To Viability, Is Unconstitutionally Overbroad And Is Void For Vagueness.

Section 6(4) prescribes a standard of care for physicians performing abortions in cases where "there exists . . . a possibility . . . of more than momentary survival of the fetus. . . ."[34] Illinois law, *supra*, Section 6(4). This is identical to the standard of care required under Section 6(1) for fetuses known to be viable.[35] The statute imposes criminal sanction on the physician or assistant who intentionally breaches this standard of care. The Court of Appeals declared this statute unconstitutional because it seeks to regulate abortions on behalf of the fetus prior to viability and infringes on a woman's right to privacy. *Diamond*, J.S. App. 32-36. This decision should be affirmed.

[33] Section 3202(a) and (c) of Pennsylvania Act, *supra*. Brief for Appellants at 1a-5a, *Thornburgh*.

[34] In pertinent part, Section 6(4) requires the physician to "exercise that degree of professional skill, care and diligence to preserve the life or health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born . . . when there . . . exists . . . a possibility known to [the physician] of sustained survival[.]" Ill. Rev. Stat. Ch. 38 ¶ 81-26(4).

[35] The Court of Appeals held Section 6(1) was unconstitutionally vague because it failed to specify that the attending physician's determination of fetal viability was controlling, and failed to give physicians and their assistants explicit notice as to what the statute prohibited. *Amici* urge affirmance of this holding.

A viable fetus is one which is [capable] of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 163. In *Roe*, this Court recognized a compelling state interest in potential life at viability which permits the state to proscribe abortions altogether except when necessary to protect the life and health of the mother. 410 U.S. at 163, 164. Prior to viability, however, the state may only regulate the abortion procedure to the extent that such regulations are "reasonably related to maternal health." 410 U.S. at 164.

1. *Section 6(4) Is Unconstitutionally Overbroad Because It Seeks To Regulate Abortions Based On The State's Interest In "Potential Life" Prior To Viability.*

In *Danforth*, this Court struck down a statute which imposed on the physician a standard of fetal care applicable to all abortions on the ground that it was unconstitutionally overbroad. In pertinent part, the statute required the physician to use the same "degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." 428 U.S. at 82. This Court held that such a provision "impermissibly requires the physician to preserve the life and health of the fetus, whatever the stage of pregnancy." 428 U.S. at 83. The State does not have a compelling interest in the fetus prior to viability and, therefore, may not regulate the abortion procedure on behalf of the fetus before via-

bility is reached. *Roe*, 410 U.S. at 164; *Danforth*, 428 U.S. at 82-83.

Similar restrictions were at issue in *Colautti*. There, the statute imposed a standard of care toward the fetus whenever the physician determined that the fetus was "viable" or "may be viable." 439 U.S. at 391. The Court held that the statute was ambiguous and therefore void for vagueness, because it concluded that "viable" and "may be viable" referred "to distinct conditions, and that one of these conditions differs in some indeterminate way from the definition of viability as set forth in *Roe* and *Planned Parenthood*." *Id.* at 393 (footnote omitted). It did not decide, therefore, whether the provision also was overbroad. The District Court in *Colautti*, however, did consider the overbreadth issue. It held that the "may be viable" provision was a clear attempt by the state to regulate abortions during the second trimester, "when it may lawfully do so only in the interest of maternal health." 401 F. Supp. 554, 572 (1975).

The Seventh Circuit, rather than finding both Section 6(1) (governing a viable fetus) and 6(4) void for vagueness, upheld Section 6(1) and found Section 6(4) unconstitutionally overbroad. Assuming that the Seventh Circuit was correct in finding that the viability aspect of Section 6(1) is constitutional, the conclusion that Section 6(4) is unconstitutional necessarily follows. Section 6(4) can only be interpreted as intended to "carve out a new time period during pregnancy when there is a remote possibility of fetal survival outside the womb, but the fetus has not yet attained the reasonable likelihood of survival that physicians associate with viability." *Colautti*, 439 U.S. at 393. Clearly, Section 6(4) is an attempt to whittle away the rights of the woman recognized in *Roe* and affirmed in *Akron*. It is, as appellants concede, an attempt to extend regulations to protect potential life earlier into pregnancy than can be justified based on any compelling interest.[36] As such, Section 6(4) is a blatant

[36] Appellants argue that even if the State's interest in the fetus is not compelling until viability, it is still substantial prior to viability. *Amici* submits that even if such an interest does exist, which we believe it does not, that interest is not sufficient to overcome the woman's fundamental right to determine whether or not to carry a pregnancy to term.

and impermissible attempt to circumvent the prior rulings of this Court. It cannot withstand the strict judicial scrutiny mandated by *Roe*. The decision of the Seventh Circuit must be affirmed.

2. *Section 6(4) Is Void For Vagueness.*

The ambiguity surrounding the "possibly viable" standard in the case at bar is identical to that "undefined penumbral" or "gray area" surrounding *Colautti*'s "may be viable" standard. *Colautti*, 439 U.S. at 391. This vagueness has a "chilling effect" on the willingness of physicians to perform second trimester abortions and risk criminal liability.[37] If upheld, it would eviscerate a woman's ability to exercise her fundamental right to decide to choose abortion.

A statute is void for vagueness if it fails to inform persons of ordinary intelligence what conduct it forbids. *United States v. Harris*, 347 U.S. 612 (1954). Particularly with respect to criminal statutes that abut fundamental constitutional rights and which, if unclear or imprecise, will inhibit the exercise of those rights, the State must proceed with clarity and precision. *See Colautti*, 439 U.S. at 390-92. Where it fails to do so, as in the case at bar, the statute is void for vagueness.

C. Sections 2(10) And 11(d) Of The Illinois Law Impermissibly Infringe Upon A Woman's Right To Privacy In Decisions Regarding Birth Control And Are Void For Vagueness.

Under the guise of protecting women from their physician's prescription of birth control substances or devices that they may not want to use, the State of Illinois made it a crime for a physician who prescribes or administers an "abortifacient" to fail to advise the patient that he

[37] *See* Affidavits of Allan G. Charles, M.D. and Martin Motew, M.D., *Diamond*, Joint Appendix at 3 and 54.

has done so. The statute defines "abortifacient" as "any instrument . . . known to cause fetal death . . . whether or not the fetus is known to exist when such substance or device is employed." Illinois law, *supra*, Sections 2(10) and 11(d).

With this regulation, Illinois adds a new dimension to the struggle to preclude women from exercising control over their own reproductive functions, and hence, their lives. Although the tactic they use may be new to this particular struggle, it is one with which women have much experience. It is one that suggests that women, for any number of reasons, need special protection to save them from disadvantage in their dealings with the world. Hence, we are told that women must be protected from doctors who would prescribe drugs or devices for them without first explaining to them the effect such instruments will have.

Not surprisingly, however the need for such protection arises only with regard to drugs or devices that operate to cause a fertilized ovum to be expelled from the woman's body; and only as to the effect such drugs or devices will have on the fertilized ovum—not the effect they may have on the woman. Thus, the physician who prescribes for a woman an intra-uterine device is compelled by special "protective" legislation to inform the woman that the device is an abortifacient that will cause expulsion of a fertilized ovum should one develop, but incurs no criminal liability for the failure to inform the patient that the device could render *her, the patient,* sterile and cause *her, the patient,* death.[38]

Thus, the Illinois abortifacient provision either is the type of protective legislation which for years protected only women's second class citizenship, and not women, or it is legislation designed to protect the fertilized ovum from inadvertent destruction. Given the legislature's

[38] *See* J. Williams, *Williams Obstetrics* 1024 (J. Pritchard and P. MacDonald 16th ed. 1980). Death from sepsis is noted as one of the complications that has been observed in connection with IUD use.

stated concern for "the unborn child . . . from the time of conception" and the compelling interest it claims in that "unborn child,"[39] it is clear that the focus of the state's concern in enacting these provisions was, in fact, the fertilized ovum and not the woman. From *Roe*, it is clear that the state has no compelling interest in such an organism. *Amici* submit, moreover, that the state has no legitimate interest at all in such an organism. Neither its concern for the fertilized ovum, nor any actual concern for the health of the woman, justifies the statute's invasion of the fundamental privacy rights that protect personal, procreative decisions from excessive governmental interference.

1. *The State May Not Regulate Abortion Based On The State's Theory Of Life.*

Section 11(d) requires physicians to advise their patients when, as defined in the law, they are prescribing an abortifacient for their patient. For all practical purposes, the only way a physician can be certain that she or he is complying with this statute is to explain to the patient, in the terms of statute, what it is they are prescribing. The fact that the statute does not specify in so many words the precise language to be used by the physician is, therefore, of little significance given the overall statutory framework. Problems will arise for the physician when she or he is asked to explain, as will surely happen, *what it means* to be told that an "abortifacient" is being prescribed. What it means, according to the statute, is that the drug or device will kill the patient's fetus, which the State believes is an unborn child. Thus, there is no escaping the conclusion that the statute does require the physician "to become the mouthpiece for the State's theory of life." *Charles v. Carey*, 627 F.2d 772, 789 (7th Cir. 1980). As such, it falls squarely within the bounds of this Court's rulings in *Roe* and *Akron* prohibiting such state interference with the woman's decision whether to terminate a pregnancy.

[39] *See* Brief of Appellants at 1a-2a, *Diamond*.

In addition, these provisions, like those defining "informed consent" in terms of specific information that must be provided by the physician to the patient, places the physician in the "undesired and uncomfortable straitjacket" about which this Court warned in *Danforth*, 428 U.S. at 67 n.8. The abortifacient provisions are simply another obstacle that the state wants to place in the physician's path in order to limit her or his discretion in advising a woman about her reproductive health needs. These provisions force the physician to accept definitions of medical and physiological terms on which, at the very least, there is no concensus.[40] What appellants describe as attempts to blur the distinctions between abortifacients and contraceptives[41] are in fact commentaries which reflect that all physicians do not agree that conception and pregnancy occur at the instant a sperm penetrates an ovum.[42] The physician who believes that conception occurs over time and that a woman is not pregnant until the fertilized ovum implants in the uterus must, nevertheless, advise the patient based on the state's theory of conception as occurring at a single point in time. This is exactly what the Court prohibited in *Danforth* and *Akron*. Thus, the "abortifacient" regulation must fall.

2. *The "Abortifacient" Provision Is Void For Vagueness.*

As set forth above, criminal statutes which threaten to inhibit the exercise of constitutionally protected rights

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[40] The evidence before the trial court included several physician's affidavits which stated, *inter alia*, that the definition of abortifacient in Section 2(10) is "medically unjustified," and "scientifically questionable." Affidavits of Drs. Charles, Zbaraz and Motew, Joint Appendix at 4, 22 and 50, *Diamond*.

[41] Brief of Appellants at 13 and n.6, *Diamond*.

[42] It has been noted that it is difficult to determine the incidence of spontaneous abortion since there is no agreement on when a pregnancy actually begins. It could be at almost any point between penetration of the ovum by a sperm to implantation of the blastocyst in the endometrium. *See* Williams, *supra* note 38, at 588. *See also*, *Roe*, 410 U.S. at 130-34 and n.22 and 159-62; and, Tribe, *supra*, note 10, at 18-21 and nn.86-94.

must be carefully and precisely drawn. Given the uncertainties that exist regarding "fertilization" and "conception" and how various methods of birth control actually work,[43] the subject provisions fall far short of minimum due process requirements.

At best, the statute is internally inconsistent. Abortion is defined as the intentional termination of a known pregnancy. Illinois law, *supra*, Section 2(6). Thus, if there is no known pregnancy, there can be no abortion. The statute, however, defines abortifacient as any instrument that would destroy the fertilized ovum, regardless of whether it was known to exist. *Id.*, Section 2(10). Assuming, as Appellants claim, however, that an abortifacient is something that causes an abortion [44] the statute's definition of abortifacient is completely at odds with the statute's definition of abortion.[45] One cannot cause an abortion unless there is a known pregnancy, and there is no known pregnancy at least until the process of conception is completed through implantation.[46] Thus, even as appellants and the Solicitor General[47] understand and explain these provisions, when taken together they do not make sense and cannot be justified on the ground of protecting women from abortions. So inconsistent a hodgepodge of medically insupportable and contradictory definitions upon which vague obligations are premised cannot possibly meet even minimal due process requirements, let

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[43] Williams, *supra* note 38, at 1012, indicates that most birth control pills act in multiple ways to prevent contraception, including preventing ovulation and/or implantation. Similarly, the contraceptive actions of intra-uterine devices "have not been precisely defined." Id. at 1021.

[44] Brief of Appellants at 11 and n.3, *Diamond*.

[45] See also physician's affidavits, *supra* note 40.

[46] Most pregnancy tests in clinical use are usually positive by the 3rd week after ovulation. Implantation of the blastocyst generally begins at the end of the first week after ovulation. Williams, *supra* note 38, at 170.

[47] *See* S.G. Brief at 14-15.

alone those imposed upon criminal statutes which infringe fundamental rights. Thus, the decision of the Seventh Circuit must be affirmed.

CONCLUSION

Amici urge this Court to affirm that the fundamental constitutional right of privacy protects the right of women to make reproductive choices without oppressive and burdensome state interference. Without this fundamental right women are denied the ability to control their own lives. We submit that the government's position not only is indefensible, but if accepted would have disastrous results for the lives and well-being of all American women. Thus, we urge the Court, once again, to affirm unequivocably its holding in *Roe v. Wade*. Furthermore, for the reasons set forth above, we urge the Court to affirm the decisions of the Third and Seventh Circuits regarding the method of abortion and abortifacient provisions of the respective state statutes.

Respectfully submitted,

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[48] Counsel wishes to acknowledge the assistance of Loren Chumley, a student at American University School of Law, in the preparation of this brief.

APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The NATIONAL ORGANIZATION FOR WOMEN (NOW) is a national membership organization of approximately 250,000 women and men in about 750 chapters throughout the country. NOW has as one of its priorities the preservation of the right to reproductive freedom, including abortion. NOW believes that every woman has a fundamental constitutional right to decide whether to terminate her pregnancy by abortion. NOW submits that this fundamental right must be affirmed and that the restrictions challenged herein impermissibly impinge upon this constitutionally protected right.

HUMAN RIGHTS FOR WOMEN, INC. (HRW) is a non-profit organization dedicated to attaining equal rights for women in every aspect of life. The organization provides volunteer legal assistance in litigation involving rights of women; researches issues relevant to discrimination against women; and provides for educational projects on conditions of concern to women. HRW believes that laws which deny or severely limit the availability of abortion, such as those before the Court in these cases, deny women their right to self-determination as human beings.

EQUAL RIGHTS ADVOCATES, INC. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to end discrimination against women. It has a long history of interest, activism and advocacy in all areas of the law which affect equality between the sexes. ERA believes that the right to control one's reproductive life is fundamental to women's ability to gain equality in other aspects of society. This concern has been expressed through our particiaption as counsel and as *amicus* in numerous cases involving women's reproductive rights.

THE LEAGUE OF WOMEN VOTERS FOR THE UNITED STATES (LWVUS) is a national, nonpartisan,

non-profit membership organization, incorporated under the laws of the District of Columbia, with a current membership of 110,000 in 1,250 state and local Leagues in all states, the District of Columbia, Puerto Rico and the Virgin Islands. Since being founded in 1920, the LWVUS's purpose has been to promote political responsibility through informed and active participation of citizens in government. The LWVUS strongly believes that public policy in a pluralistic society must affirm the constitutional right of privacy of the individual to make reproductive choices. The LWVUS further believes that the *Roe v. Wade* decision is an important protection of this constitutional right.

THE NORTHWEST WOMEN'S LAW CENTER is a non-profit Washington State organization dedicated to securing equal rights for women through the law. The Northwest Women's Law Center provides the only sustained effort in the Pacific Northwest serving the legal needs of women from all socio-economic backgrounds. The Law Center has participated in significant cases before state and federal courts involving issues which have a major impact on women, and specifically has participated as *amicus curiae* in several cases which focused on the constitutionality of legislation hindering the exercise of a woman's right to decide whether to terminate a pregnancy.

THE NATIONAL WOMEN'S LAW CENTER is a Washington, D.C.-based legal organization which has been working since 1972 to advance and protect women's legal rights. The Center's primary goal is to ensure that public and private sector practices and policies better reflect the needs and rights of women. The fundamental right to abortion recognized in *Roe v. Wade* is of profound importance to the lives, liberty, health and safety of women throughout the country. Because of the tremendous significance to women of the freedom to choose whether to bear children, the National Women's Law Center seeks to preserve women's right to abortion.

THE NOW LEGAL DEFENSE AND EDUCATION FUND (NOW LDEF) was founded in 1970 by leaders of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF has participated as *amicus* before this and other courts in several cases involving women's reproductive rights.

THE WOMEN'S LEGAL DEFENSE FUND (WLDF) is a non-profit, tax-exempt membership organization founded in 1971 to provide *pro bono* legal assistance to women who have been discriminated against on the basis of sex. The right of women to decide for themselves whether or when to bear children is essential to women's achievement of full equality in our society. WLDF is committed to helping women achieve that equality and has participated as *amicus* before this Court and others in cases where the right to choose abortion has been challenged.